Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
GTE CORPORATION,	)	
Transferor	)	
and	)	CC Docket 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee	)	
	)	
For Consent to Transfer of Control	)	

COMMENTS OF CORECOMM LTD.

Christopher A. Holt
Assistant General Counsel
CoreComm Incorporated
110 East 59th Street
New York, NY 10022
(212) 906-8440 (Tel)
(212) 906-8497 (Fax)

Eric J. Branfman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7553 (Tel)
(202) 424-7645 (Fax)

ATTORNEYS FOR
CORECOMM LTD.

Dated: November 23, 1998

No. of Copies rec'd 0+9
List A B C D E

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EXECUTIVE SUMMARY

As as the ultimate parent of competitive local exchange carriers actively seeking entry into GTE local service markets and considering entry into Bell Atlantic markets, CoreComm Ltd. ("CoreComm") is concerned about the competitive implications of a union of these two significant incumbents. Following the merger, these companies would control one third of all access lines nationwide (with the potential SBC-Ameritech behemoth controlling another third). While Bell Atlantic and GTE claim that this union will allow GTE to launch competitive attacks into other incumbent territories, they do not present a convincing case. Indeed, GTE already has a presence close to major metropolitan areas, a recognized brand name, the benefit of a long history in the local exchange business, and promising financial prospects. Bell Atlantic has a similarly strong financial position, local exchange experience, and brand name presence. Neither of these companies needs to merge in order to present a real competitive threat to other incumbents.

More likely, Bell Atlantic and GTE would use the size and scope obtained through a merger to deter competitive entry into their combined territories. These companies have not embraced competition to date, as the numbers of lines resold and unbundled network elements provisioned in their service areas attest. Thus, CoreComm recommends that the Commission find that this merger would not be in the public interest and deny the request for transfer of control. In the alternative, if the Commission somehow finds that this transaction should be approved, it should only grant approval upon Bell Atlantic-GTE's agreement to satisfy several conditions *before the merger* and a series of conditions after the merger as well. Only by imposing stringent, market-opening conditions can the Commission ensure that the new mega-incumbent will not use its size to thwart the development of local exchange competition.

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COMMENTS OF CORECOMM LTD.

CoreComm Ltd. ("CoreComm"), by undersigned counsel, hereby submits its Comments in opposition to the transfer of control of GTE Corporation ("GTE") to Bell Atlantic Corporation ("Bell Atlantic"). Through one of its subsidiaries, CoreComm has been reselling Ameritech service to residential customers in Ohio since March 11, 1998, and as described herein, has attempted to obtain an interconnection and resale agreement with GTE for Ohio. CoreComm subsidiaries have competitive local exchange carrier ("CLEC") certification in several other states, and are preparing to file certification applications in numerous other jurisdictions. CoreComm expects that its subsidiaries will provide service not only through the resale of service provided by GTE and other incumbent local exchange carriers ("ILECs"), but also through the use their own facilities in conjunction with the use of unbundled network elements provided by the ILECs.

As a CLEC entity actively seeking to enter GTE territory and considering expansion into Bell Atlantic service areas, CoreComm is concerned about the incentive and ability that a combined Bell Atlantic-GTE super ILEC would have to discriminate against CoreComm and other new entrants.

The potential threat to competition posed by this proposed union of Bell Atlantic and GTE should cause the Commission to reject this merger in the first instance, or in the alternative, to impose stringent market-opening conditions that will help reduce the likelihood that the newly created super ILEC could discriminate against its competitors in the local exchange market.

I. THE MERGER WOULD ADVERSELY AFFECT LOCAL COMPETITION ACROSS THE NATION.

Standing alone, this merger presents significant competitive concerns that could have adverse implications throughout local exchange markets nationwide. The combined Bell Atlantic-GTE behemoth would control approximately 63 million access lines, representing close over one-third of the nation's access lines.[1] Taken together with the SBC-Ameritech merger, however, the competitive implications of this proposed union are all the more troubling. If both this merger and the SBC-Ameritech merger are approved, Bell Atlantic-GTE and SBC-Ameritech together would control some 116 million access lines,[2] representing 67 percent of the access lines nationwide.[3]

There are several respects in which the extreme concentration these mergers would bring about can be expected to have a severe adverse impact on the future of competition in local exchange markets in Bell Atlantic and GTE service territories and throughout the country. These concerns are discussed below.

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1 *"Bell Atlantic and GTE Agree to Merge,"* News Release, July 28, 1998, http://www.ba.com/nr/1998/Jul/1998072800.1.html.

2 SBC and Ameritech together have more than 53 million access lines. SBC Communications, Inc., Form 10-K, filed March 13, 1998, at 5; Ameritech Corp., Form 10-K, filed March 13, 1998, at 2.

3 Federal Communications Commission, *Statistics of Common Carriers*, Table 2.10.

A. The Merger Would Reduce the Prospect that Bell Atlantic and GTE Will Seek to Compete in the Service Territories of Other ILECs.

Notwithstanding Bell Atlantic-GTE's claims about the increased opportunities presented by the merger for forays by GTE's operations into neighboring ILEC service areas,[4] the proposed merger would in fact reduce the chance that entry by GTE will provide much-needed competition and consumer choice in urban and suburban markets that are now controlled by Bell Atlantic, BellSouth, Ameritech, or other ILECs. GTE already has a presence close to major metropolitan areas, a recognized name, and a long experience in the technical and administrative problems of providing local exchange service. Indeed, in their merger approval application GTE and Bell Atlantic argue that because "GTE shares an MSA or serves neighboring suburbs in several of the most attractive Bell markets," the merged company will be able to "attack other Bell company strongholds across the country."[5] In many respects, therefore, GTE is already ideally suited to provide additional local competition in metropolitan areas such as Cleveland and Columbus – key markets in CoreComm's home state of Ohio.

The premise that these companies must control over one third of the nation's access lines to compete is an erroneous one. In fact, neither Bell Atlantic nor GTE needs this merger to accomplish these competitive objectives. GTE's strong financial health should already provide it with the ability to enter other incumbent markets without the added coffers of Bell Atlantic. As the company trumpeted in a recent press release, GTE has just experienced its "13th consecutive quarter of

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[4] *See GTE Corporation and Bell Atlantic Corporation, Application for Consent to Transfer of Control*, Application for Transfer of Control, Public Interest Statement, at 1-2 ("Application").

[5] *Id.*

double-digit [earnings per share] growth."[6] The company has also experienced five straight quarters of consolidated revenue growth.[7] The even larger Bell Atlantic reported last month that its consolidated operating income increased 12.4 percent in the third quarter of 1998, and that its earnings per share increased by 11.3 percent in the same period.[8] Moreover, both of these companies possess the kind of brand name recognition in the local market that this Commission has recognized as essential to be as significant competitor in the local exchange market.[9] When one pauses to consider the efforts smaller competitive carriers are already making to date in entering the local exchange market nationwide, it should be clear that companies of such size and such significant earning potential hardly need to merge in order to proceed with competitive forays into other ILECs' markets. Instead, as discussed below, the primary purpose and primary result of this merger would be to give these companies the ability to retrench and protect their own territories from entry by other carriers.

While GTE would continue after a merger with Bell Atlantic to possess the capability to "attack" other ILEC strongholds, in fact the proposed merger would create a significant *disincentive*

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[6] *"GTE Reports 11% Consolidated Income Growth and Double-Digit Core EPS Growth in Third Quarter,"* Press Release, Oct. 19, 1998, http://www.gte.com/AboutGTE/news/3Q98.html.

[7] *See id.*; *"GTE Announces Strong Financial Results, Generating Double-Digit Consolidated Revenue Growth and 11% Core EPS Growth in Second Quarter,"* Press Release, July 20, 1998, http://www.gte.com/AboutGTE/news/2Q98.html.

[8] *"Bell Atlantic Third Quarter Adjusted EPS Rises 11.3%,"* News Release, Oct. 21, 1998, http://www.ba.com/nr/1998/Oct/19981021002.html.

[9] *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 20040 (¶ 106) (1997) ("*Bell Atlantic/NYNEX Merger Order*").

for GTE to do so. That is because such an attack is virtually certain to elicit a retaliatory response by Ameritech (or SBC-Ameritech) in the "attractive" metropolitan area markets that Bell Atlantic now controls (such as New York City). By contrast, absent the merger, the areas that GTE now controls would be much less attractive to SBC-Ameritech or other ILECs as a target for a retaliatory response to a GTE foray into Cleveland, Columbus, or other major metropolitan areas.[10]

This Commission has recognized that where a significant market participant has "something to lose," it is more likely to participate in tacit market-sharing arrangements.[11] With control of more than one-third of the nation's access lines, the combined Bell Atlantic-GTE would clearly have "something to lose" – for example, domination of the New York City market – if, after the merger, it attacks Cleveland or other markets now dominated by other ILECs. Thus, if the merger is allowed, GTE will have a greater incentive either to withdraw its nascent attempt to enter markets such as Columbus, or to remain in that market but compete less than vigorously for fear of retaliation. It will almost certainly have less of an incentive to enter other ILEC markets.

In addition, as the Commission has recognized, the result of a reduction of firms in a market is that "other firms are more able to punish cheating by a deviant firm through retaliation."[12] This means, as the Commission observed, that "[a]s the number of most significant market participants

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10 Indeed, Bell Atlantic and GTE have conceded the low priority of GTE's current service areas as a target for competition from other LECs. They argued that "GTE's predominantly rural or suburban and dispersed service territories" are an "unlikely" competitive target for Bell Atlantic. Application, at 31. For the same reason, GTE territories are an unlikely target for a retaliatory response by any other Bell Company whose market GTE might enter.

11 *Bell Atlantic/NYNEX Merger Order*, 12 FCC Rcd at 20047-48, ¶ 123.

12 *Id.* at 20046-67, ¶ 121.

decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers." [13] Nationwide, the various Bell companies have arrived at a "mutually beneficial market equilibrium, to the detriment of consumers," by geographically dividing their markets and refraining from serious competitive forays into each other's territory – despite the fact that they have long had the financial clout and the administrative expertise to compete vigorously in one another's territories.

Indeed, the logical result of the Bell Atlantic-GTE argument is a telecommunications market dominated by two or three super ILECs. If the proposed merger is approved, concentration in the local exchange market will be vastly increased. Still worse, as previously described, if both this merger and the SBC-Ameritech merger are approved, two giant firms will control over two-thirds of the local market nationwide, with only two other firms (US West and BellSouth) dividing most of the remainder (and with the increased likelihood that these two firms will somehow escalate by finding a partner). In these circumstances, it becomes increasingly likely that GTE – after becoming part of a mega-ILEC that will have more to lose than to gain by igniting competition among the giants and upsetting the "equilibrium" – will carefully refrain from any serious competitive foray into other ILECs' markets.

Finally, in the past, mergers have been disapproved because they would reduce the number of significant firms in the market to four and thereby increase the likelihood of tacit collusion.[14] The

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[13] *Id.*

[14] *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) (reduction to four firms "will make it easier for leading members of the industry to collude"); *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) ("As a result of the acquisitions the four largest firms came to control virtually the whole market, and the problem of coordination was therefore reduced to one

same reasoning supports disapproval of this merger, which in combination with the SBC-Ameritech merger would reduce the number of significant participants in the local exchange market to four (Bell Atlantic-GTE, SBC-Ameritech, US West and BellSouth).

B. The Merger Will Entrench a Company that Has Resisted Opening Its Markets to Competition.

In reviewing the proposed union of Bell Atlantic and GTE, the Commission should focus primarily upon the failure of these ILECs to implement meaningfully the pro-competitive measures required by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"). In fact, the proposed creation of this super ILEC is anticompetitive and contrary to the public interest because it will vastly increase the size and economic power of a company with a long history of resisting the market-opening measures now required by federal and state law in the local exchange market. Unlike the Bell companies – which are at least subject to the restraint that they cannot enter the long-distance market until they have complied with the "competitive checklist" of section 271 of the Act[15] – GTE is presently subject to no such restraint.[16] Because of this freedom as compared to the Bells,[17] GTE has felt even less inhibited than the other ILECs in engaging in

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of coordination among these four.")

[15] 47 U.S.C. § 271(c)(2)(B) (1996).

[16] According to GTE's 1996 Annual Report, it was offering long distance services in all 50 states by the end of 1996. GTE Corporation Annual Report 1996, http://www.gte.com/AboutGTE/annual1996/intro/intro.html.

[17] In March 1998, GTE announced that "[t]wo years after GTE became *the first of its peers to enter the long distance business*, . . . it now provides long-distance service to two million customers nationwide. The total represents a 100 percent increase in GTE's long-distance customer base in just one year." "*GTE Marks Two-Year Anniversary in Long-Distance Business with Two Million Customers in Service; Doubles Customer Base in Just One Year*," Press Release, dated Mar. 31, 1998, http://www.gte.com/AboutGTE/news/LDanniversary.html (emphasis added).

delaying and obstructionist tactics to thwart implementation of the federal and state market-opening requirements. Since the Act became law nearly three years ago, GTE's coordinated national strategy of delay and intransigence has stifled development of local competition. Indeed, GTE's tactics have served to close GTE's markets in many states, including Ohio, to any substantial local competition, whether by resale or by use of unbundled network elements purchased from GTE.

GTE's success in closing its markets to CLECs is starkly reflected in data it recently submitted to this Commission regarding its provisioning of resold lines and unbundled network elements to new entrants. According to its voluntarily submitted Local Competition Report, more than two years after passage of the Telecommunications Act and its much heralded entry into the long distance market, only .56% of lines in GTE's service territory *nationwide* are served by resellers.[18] In provisioning unbundled network elements, GTE's record is even more dismal, as only .06% of the lines in its service territory are provided on an unbundled basis.[19] In other words, for every two hundred lines served by GTE, a reseller serves about one line; for every two thousand lines served by GTE, approximately one line is served by a competitor through the use of network elements. While the other ILECs' data hardly reflect the presence of vigorous (or even modest)

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[18] GTE Responses to Second CCB Survey on the State of Local Competition, Federal Communications Commission, http://www.fcc.gov/ccb/local_competition/survey/responses/. GTE's report lists a national total of 82,540 lines provisioned to resellers as of June 30, 1998, with the company having a total of 14,836,910 lines in service (retail and wholesale). In some states, such as Illinois, Indiana, Ohio, Pennsylvania, and Wisconsin, GTE's resold lines amount to fewer than 100. In Michigan, GTE has not provisioned a single resold line.

[19] Nationally, GTE has provisioned 8,930 lines through unbundling. Almost 8,000 of these lines are in Texas. No unbundled network elements have been provisioned by GTE in Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, North Carolina, Ohio, Oregon, Virginia, and Washington. One line has been provided through the use of unbundled network elements in the company's Pennsylvania service territory. *Id.*

competition, GTE's data reflect a truly microscopic level of competition. The data suggest, for example, that there is over 100 times as much competition for Bell Atlantic as for GTE in Pennsylvania.[20] This is all the more troubling when one pauses to consider that the data show that competition in Bell Atlantic's service area is itself paltry.[21] Indeed, in light of the minimal market penetration figures set forth in Bell Atlantic's reports, the data provide little basis for believing that the merger will create any significant infusion of competition into GTE territory.

If GTE is permitted to merge with Bell Atlantic, thereby more than doubling in size and power, its ability and incentive to thwart competitive entry will be heightened, to the detriment of competition and the consuming public. As shown below, GTE's strategy to frustrate competitive entry has been based upon two basic principles: GTE makes it as costly and burdensome as possible for CLECs to enter its territory, and then attempts to ensure that the terms and conditions under which competitors can do business in its territory are as disadvantageous to them as possible. The data set forth above attest eloquently to the success of this GTE strategy, and suggest that an even larger, more powerful mega-ILEC combination of Bell Atlantic and GTE would have greater incentives to protect its sizeable customer base and an increased ability to limit competitive entry.

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[20] In Pennsylvania, as of June 30, 1998, Bell Atlantic had resold 71,486 lines and provisioned 20,497 lines on an unbundled basis to competitors. There were 6,357,775 lines in service (retail and wholesale) as of that date. By contrast, GTE had resold 63 lines and provisioned 1 unbundled network element in Pennsylvania (out of 635,109 total lines) as of the same date. *Id.*

[21] The number of total local lines Bell Atlantic provided to other carriers (resale and unbundled network elements) as a percentage of total lines in service is disturbingly low: Washington, D.C. - 0.75%; Delaware - 1.4%; Massachusetts - 2%; Maryland - 0.4%; Maine - 0.3%; New Hampshire - 1.1%; New Jersey - 0.4%; New York - 2%; Pennsylvania - 1.4%; Rhode Island - 0.8%; Virginia - 0.3%; Vermont - 0.2%; West Virginia - 0%. Of the total lines Bell Atlantic provided other carriers, 12.3% were UNEs. *Id.*

1. The Negotiation Process

All CLECs seeking to provide competitive local exchange services in GTE's service territory must begin with interconnection negotiations with GTE. While the Act sets out a swift schedule for negotiating such agreements, GTE has perfected methods to make these negotiations difficult, protracted, and costly. GTE's negotiating position regularly ignores and conflicts with state arbitration rulings that have already been issued. As a result, each successive CLEC is forced to negotiate issues which have already been resolved dispositively at the state commission level, needlessly wasting the CLEC's resources and detracting from any legitimate issues the parties may need to resolve within the 160 day negotiating period provided by section 252 of the Act.

CoreComm has experienced firsthand the difficulties associated with GTE's patent disregard for state commission precedent and federal law. For example, CoreComm's subsidiary requested interconnection with GTE in Ohio more than a year after the Public Utilities Commission of Ohio ("PUCO") issued its arbitration award in the AT&T/GTE arbitration.[22] Despite the fact that the PUCO resolved 63 issues between those parties in that case, GTE tendered a draft interconnection agreement that conflicted with many of those rulings. The most significant conflict, from CoreComm's point of view, related to rates for CoreComm's purchase of GTE unbundled loops. Although the Commission specifically rejected GTE's pricing proposal to AT&T of $30.00 unbundled loops as excessive and ordered an interim GTE loop rate of $15.63,[23] GTE offered the

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22 *In the Matter of the Petition of AT&T Communications of Ohio for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB, Arbitration Award, (P.U.C.O. Dec. 24, 1996).

23 *Id.* at 28.

same rejected $30.00 loop rate to CoreComm.[24] GTE's failure to adjust its negotiating positions to accommodate its losses at arbitration on pricing and other issues forces CLECs to negotiate and relitigate the same matters that the Commission has already considered.[25]

GTE's failure to respect the decisions of this Commission, various state commissions, and federal and state courts is but one example of its lack of good faith in negotiating with CLECs. Indeed, GTE prematurely appealed the Commission's AT&T arbitration award to federal district court, which dismissed it for lack of jurisdiction.[26] Federal courts have uniformly rejected numerous premature GTE appeals of arbitration decisions.[27] These meritless GTE appeals serve only to delay the unencumbered availability of interconnection agreements to other CLECs that wish to exercise

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[24] GTE's proposal would allow CoreComm to purchase loops at the rates provided in the AT&T arbitration, but only after GTE's agreement with AT&T is signed, is approved, and becomes effective. As is common practice around the country in the context of GTE arbitrations, it has been 23 months since the PUCO's GTE/AT&T arbitration decision, and there is still no such agreement.

[25] CoreComm's negotiations with GTE have not progressed, in large part because GTE's proposed agreement contained numerous provisions that would make it impossible for CoreComm to have an opportunity to enter GTE's territory on a profitable basis. CoreComm was aware from its knowledge of GTE's past conduct that negotiating or arbitrating suitable modifications would be extraordinarily time consuming and expensive. That fact, together with the necessity to replace its counsel as a result of a conflict of interest, led CoreComm to defer serious negotiations with GTE (and hence entry into GTE's territory) while it pursued other matters. CoreComm recently engaged replacement counsel and expects to engage in serious interconnection negotiations with GTE in the immediate future.

[26] *GTE North v. Glazer*, 989 F.Supp. 972 (N.D.Ohio 1997).

[27] Published decisions in eight such premature GTE appeals are cited in *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 1998 WL 413749 at *4 (W.D. Mich. July 21, 1998).

their rights pursuant to section 252(i) of the Act, preventing competitors from entering the local exchange market.[28]

GTE has also employed obfuscation tactics in various negotiations by changing its positions once negotiations are substantially under way or even after an arbitration proceeding has commenced. CoreComm is aware that other CLECs that have negotiated with GTE on a multi-state basis have discovered that after they have negotiated or arbitrated interconnection agreements with GTE for one state, when they move on to negotiate an agreement with GTE for another state, GTE has insisted upon starting negotiations from scratch, rather than carrying forward terms and conditions already agreed to by the parties in other states.

In another instance, GTE went so far as to raise at arbitration new contract issues it had never articulated in 160 days of negotiations with a CLEC.[29] GTE's backtracking in negotiations is in dereliction of its section 251(c)(1) duty to negotiate in good faith. The effect of this conduct upon CLECs is to inject unnecessary costs and delays into the interconnection process. This in turn harms consumers by delaying local competition.

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[28] AT&T's arbitrations with GTE have not resulted in approved interconnection agreements in Ohio and many other states. While the parties' failure to execute a final agreement reflecting the arbitration prevents other CLECs from adopting an AT&T agreement, that failure does not excuse GTE's assertion in subsequent negotiations of the very positions that the state commissions have already rejected.

[29] *In the Matter of KMC Telecom Inc. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with GTE North Incorporated,* Cause No. 40832-INT-01 (Ind. U.R.C. Feb. 11, 1998).

2. The Arbitration Process

Once an arbitration proceeds, GTE again places serious obstacles in the way of resolving differences with CLECs. Specifically, GTE insists upon numerous contract provisions that range from anticompetitive to patently frivolous. In addition to the problems raised above in terms of strategic, premature appeals and the introduction of new issues at arbitration, GTE forces CLECs to litigate the same issues over and over again, sometimes more than once in a single state. GTE's actions erect barriers to competition that divert CLEC resources from serving customers to fighting regulatory battles with GTE. Moreover, even after it completes an arbitration, GTE somehow manages to avoid signing an interconnection agreement. In Ohio, for example, GTE completed arbitrations with AT&T and Sprint nearly two years ago,[30] yet it has no interconnection agreement with either. Unfortunately, the Ohio experience is not atypical. CoreComm is aware that GTE arbitrated with AT&T in Indiana and Illinois at about the same time as its Ohio arbitration, yet has no approved agreement with AT&T in either of those states. GTE's refusal to execute an agreement in which all legal issues should have been fully resolved represents no more than an effort to deny competitors the opportunity to avail themselves of section 252(i) rights and to drive up artificially the costs of competitive entry.

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30 *In the Matter of the Petition of AT&T Communications of Ohio for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB, Arbitration Award, (P.U.C.O. Dec. 24, 1996); *In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated,* Case No. 96-1021-TP-ARB, Arbitration Award, (P.U.C.O. Jan. 13, 1997), at 13.

3. The Adoption Process

Section 252(i) of the 1996 Act provides that CLECs may adopt other approved interconnection agreements. Adopting another interconnection agreement should be a wholly administrative task in which requisite filings are made to state commissions; no negotiation should be necessary. Bell Atlantic has, however, turned the exercise of section 252(i) rights into a protracted process riddled with unnecessary negotiations and interminable administrative delays. Bell Atlantic's merger with GTE might only fortify the latter's resolve to take the same obstructionist approach in this regard.

CoreComm is aware that Bell Atlantic has insisted in a draft opt-in document that carriers seeking to adopt another agreement must respect any subsequent modifications that the primary CLEC and the ILEC negotiate. This position does not withstand scrutiny. As an example, the initial CLEC could determine that it will pursue only a resale strategy and not purchase any unbundled elements, and modify its agreement by deleting provisions for purchase of unbundled elements in exchange for gains in other areas of the agreement. While this might benefit the primary CLEC, the secondary CLEC would be locked into an agreement that was desirable when it opted in, but has been changed by other parties and has become unsatisfactory. Clearly, ILECs are not entitled to renegotiate other carriers' contracts without their participation. Yet it is CoreComm's understanding that Bell Atlantic insists on negotiating this provision every time a carrier opts into the agreement.

Bell Atlantic has also attempted to use the "opt-in" process to attempt to extract concessions from CLECs regarding reciprocal compensation. For example, in September 1998, ChoiceOne Communications, a New York CLEC, requested to adopt one of Bell Atlantic's New York interconnection agreements. Bell Atlantic returned an adoption agreement that would have denied

ChoiceOne reciprocal compensation for terminating traffic to Internet Service Providers, contrary both to the language of the primary interconnection agreement and to a controlling New York Public Service Commission decision on the subject. Bell Atlantic later relented, but only after ChoiceOne had to incur the expense of bringing the matter to the New York Commission's attention.[31] Again, the CLEC lost time and resources disputing a matter already decided. Moreover, despite the fact that Bell Atlantic relented in that instance, it continues to press other carriers seeking to opt into existing agreement to agree to the same language denying reciprocal compensation.[32] Bell Atlantic's conduct is aimed at eviscerating the usefulness of section 252(i) and further driving up the costs of competitive entry.

4. The Process of Establishing Rates Between GTE and CLECs

For CLECs to be able to compete effectively in GTE markets, they must be able to obtain critical services, such as unbundled loops, at reasonable, cost-based rates. Otherwise, their theoretical "statutory right" to compete in GTE territory will remain theoretical. Unfortunately, GTE has erected substantial obstacles to a CLEC's ability to obtain reasonable rates for these critical services through its excessive pricing proposals and its staunch refusal to afford other CLECs the cost-based rates set in state commission arbitrations. A CLEC has two choices: it can pay the

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31 *See* September 28, 1998 and October 26, 1998 letters from E. Branfman, counsel for ChoiceOne Communications, to D. Renner, Acting Secretary, New York P.S.C, Case No. 97-C-0271.

32 *See* November 11, 1998 letter from E. Branfman, counsel for PaeTec Communications, Inc. to I. Seidenberg, President and Chief Executive Office, Bell Atlantic, and to J. Goldberg, President-Telecom Industry Services, Bell Atlantic; November 13, 1998 letter from E. Branfman to Commissioners of the Federal Communications Commission and various state commissions.

unreasonable rates advocated by GTE or it can engage in a costly and time-consuming struggle in a rate proceeding to establish (just as another carrier may very well have in a prior arbitration in the same state) the impropriety of GTE's proposals. Since enactment of the Telecommunications Act, GTE has consistently taken the position that it should be entitled to recover all of its historical costs from competitors through unbundled network element ("UNE") prices, notwithstanding the forward-looking cost standard contained in section 252(d) of the Act.

From Ohio to Missouri to Hawaii to Indiana to Minnesota to North Carolina to New Mexico,[33] GTE has repeatedly argued that the passage of the Telecommunications Act has caused it harm, such that it is forced to sell access to its network elements at rates that are somehow less than compensatory. Of course, such claims are flatly inconsistent with the optimistic tone taken by GTE in its 1996 Annual Report, when its Chairman trumpeted passage of the Telecommunications Act as "a triple-win situation. It's good for the country. It's good for consumers. And it's *great* for GTE."[34] Quite simply, GTE is looking to sustain its monopoly-era revenues in a competitive local exchange environment by collecting its shortfall from competitors, even as it praises the Telecommunications Act for allowing it to enter other markets for the first time and draw revenues away from the large long distance carriers.

The Act expressly prohibits the kind of stranded cost recovery that GTE has proposed in state after state. Section 252(d) of the Act specifically limits the costs that ILECs will be allowed to

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[33] Case No. 96-832-TP-ARB (P.U.C.O); Case No. TO-97-124 (Mo. P.S.C.); Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-442, 407/M-96-939 (Minn. P.U.C.); Docket No. P-100, Sub133d (North Carolina U.C.); Docket No. 96-310-TC (N.M.S.C.C.).

[34] GTE Corporation Annual Report 1996, Chairman's Message (emphasis in original) http://www.gte.com/AboutGTE/annual1996/letter/letter.html.

recover to those costs "determined without reference to a rate-of-return or other rate-based proceeding."[35] While the statute clearly disallows the stranded cost recovery that GTE repeatedly proposes, and no state commission to date has approved such a recovery mechanism in the telecommunications context, GTE continues to offer up this proposal in state after state in an effort to inflate its prices and foist historical costs onto competitors. Indeed, commissions in Ohio, Missouri, Indiana, Minnesota, and New Mexico have already issued rulings that GTE's efforts to raise the costs that new entrants will pay to access its network and compete for customers are inconsistent with the Act.[36]

To further burden CLECs seeking to enter GTE territory, in addition to its "stranded cost" recovery theory, GTE has also proposed in several states that competitors pay a so-called "interim universal service" surcharge directly to GTE.[37] Again, this surcharge has no relationship whatsoever

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[35] 47 U.S.C. § 252(d)(1)(A)(i) (1996).

[36] *See Petition of AT&T Communications of Ohio for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with GTE North Incorporated*, Case No. 96-832-TP-ARB, Opinion and Order (P.U.C.O. May 1, 1997), at Attachment, p.6; *Re Sprint Communications Company, L.P.*, Case No. TO-97-124, 176 P.U.R. 4th 285, 289 (Mo. P.S.C. Jan. 20, 1997); *In the Matter of the Commission Investigation and Generic Proceeding on GTE's Rates for Interconnection Services, Unbundled Elements, Transport and Termination Under the Telecommunications Act of 1996*, Cause No. 40618 (I.U.R.C. May 7, 1998); *AT&T Communications of the Midwest, Inc.*, Docket No. P-442, 407/M-96-939, 1997 WL 178602, at *12 (Minn. P.U.C. Mar. 14, 1997); *In the Matter of the Consideration of a Rule Concerning Costing Methodologies*, Docket No. 96-310-TC (N.M.S.C.C. July 15, 1998), at 50-52. The Hawaii Public Utilities Commission has issued a proposed decision rejecting GTE's stranded cost recovery schemes. *Public Utilities Commission Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Docket No. 7702, Proposed Decision and Order (Haw. P.U.C. Nov. 13, 1998) ("*Hawaii Decision*"), at 107. A decision in North Carolina is pending.

[37] Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.). A decision on the proposed surcharge is pending in North Carolina, while consideration of

to the pricing standards in the Act: GTE would have its competitors pay this extra amount to ensure that it does not lose any "support" when those competitors take certain customers off of GTE's network. Nor does this proposed surcharge have any relation to universal service principles under the Act, as a mechanism that pays directly to the incumbent carrier for alleged losses of implicit subsidies can hardly be considered equitable and nondiscriminatory.[38] In fact, even though the fundamental principle of universal service is to make telecommunications affordable for consumers,[39] GTE's proposed surcharges have been aimed solely at bolstering GTE's competitive position through the imposition of unwarranted financial burdens on competitive entrants.

III. THE CLAIMED BENEFITS OF THE MERGER FOR LOCAL AND LONG-DISTANCE COMPETITION ARE ILLUSORY.

A. The Merger Will Not Benefit Local Competition.

The Application claims that the merged company "will have a far greater ability to enter and compete quickly and effectively against the incumbent Bell company in [] key markets outside the Bell Atlantic region than GTE would have on its own."[40] Specifically, Bell Atlantic and GTE

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this issue has been transferred to a general universal service docket by the Indiana Commission. The New Mexico State Corporation Commission has rejected GTE's proposed interim universal service surcharge, noting that "double recovery of costs may result." *In the Matter of the Consideration of a Rule Concerning Costing Methodologies*, Docket No. 96-310-TC (N.M.S.C.C. July 15, 1998), at 52. Hawaii has similarly issued a proposed decision finding that GTE's surcharges would be inconsistent with the Act because they would guarantee the ILEC a revenue stream in a competitive environment. *Hawaii Decision*, at 116-117.

38 *See* 47 U.S.C. § 254(b)(4) (1996).

39 *Id.* at § 254(b)(1).

40 Application, Public Interest Statement, at 2.

contend that this larger company will be better able to undertake an ambitious campaign to provide facilities-based local competition against other ILECs.

The Commission should not overlook the fact that Bell Atlantic and GTE are already huge companies capable of competitive forays without each other's assistance. Bell Atlantic already controls over 41 million access lines[41] and serves the headquarters of 175 of the Fortune 500 companies.[42] In 1997, GTE had revenues of $23.26 billion, operating income of $5.6 billion, and net income of $2.79 billion.[43] As noted above, both Bell Atlantic and GTE are continuing to do well financially.[44] Moreover, in its latest annual report, GTE boasts that it is not only "one of the world's largest telecommunications companies," but also that it is "a leading provider of integrated telecommunications services, providing "local service in 28 states and wireless service in 17 states, nationwide long-distance service and internetworking services ranging from dial-up Internet access for residential and small-business consumers to Web-based applications for Fortune 500 companies, and video service in selected markets."[45]

In short, there is no reason to believe that Bell Atlantic and GTE could not compete in other markets without combining into a super ILEC. GTE already has all the financial clout it needs to go forth from its incumbent territory compete against other neighboring ILECs in the country's

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41 Bell Atlantic Media Fact Sheet, http://www.ba.com/kit/.

42 *"Bell Atlantic and GTE Agree to Merge,"* News Release, July 28, 1998, http://www.ba.com/nr/1998/Jul/19980728001.html.

43 GTE Corporation Annual Report 1997, Consolidated Financial Highlights, http://www.gte.com/AboutGTE/annual1997/bigidea.html.

44 *See* footnotes 6-8 *supra* and accompanying text.

45 GTE Corporation Annual Report 1997, "Introduction - About GTE."

major metropolitan areas (including Bell Atlantic's Washington, D.C. service territory near Dulles Airport), together with the broad range of products it needs to offer its customers a total package of services. There is simply no reason (other than obtaining a monopolistic advantage) why it needs to merge with Bell Atlantic before competing outside its current service areas. That fact was acknowledged by GTE's Chairman and CEO in the company's Annual Report of 1997, where he stated:

> We're confident about GTE's ability to succeed in the competitive marketplace *without* entering into a major transaction or combination with another company. In other words, we can go it alone and win.[46]

Bell Atlantic and GTE name AT&T, MCI WorldCom, and Sprint as their principal competitors. Of these three, the 1997 figures show that GTE and Bell Atlantic are individually larger than Sprint ($14 billion revenue, $952 million net income),[47] comparable to MCI WorldCom ($27 billion revenue, $592 million net income),[48] and smaller than AT&T ($51 billion revenue, $4.3 billion net income).[49] Indeed, both Bell Atlantic and GTE dwarf the next tier of CLEC competitors *taken as a whole*. Just because a single competitor, AT&T, is larger than either Bell Atlantic or GTE does not mean that the latter companies should be permitted to merge; such "leapfrog" reasoning for mergers would ultimately result in two companies in a market. Moreover, AT&T's limited success

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[46] *Id.,* "Chairman's Message" (emphasis in original).

[47] Sprint 1997 Annual Report

[48] WorldCom, SEC Form 10-K (1997); MCI, SEC Form 10-K (1997).

[49] AT&T Earnings Commentary: October 26, 1998 3Q 1998 Appendices, http://www.att.com/ir/commentary/983q-cmnt-a.html#appendix-ii.

in the local exchange market to date indicates that neither company is in danger anytime soon of losing significant market share to AT&T in their incumbent territories.

Moreover, the strategy that Joint Applicants have announced they will employ for entry of the merged company into metropolitan areas near GTE territory is anticompetitive. Bell Atlantic and GTE have explained that after the merger the merged company would enter local markets in MSAs served by other LECs by selling to "anchor customers" – corporate offices of companies with headquarters in Bell Atlantic's region that already use Bell Atlantic's service:

> Many of the Nation's largest business customers are headquartered in the Bell Atlantic region and have subsidiaries or affiliates outside of Bell Atlantic's franchise. The merged entity will be able to utilize Bell Atlantic's existing relationships with these customers to sell through to their subsidiaries or affiliates in selected out-of-franchise locations.[50]

This is a proposal for the merged company to utilize its monopoly position in the MSAs presently controlled by Bell Atlantic to leverage GTE's entry into other MSAs. While Bell Atlantic currently serves the headquarters of 175 of the Fortune 500 companies, smaller CLECs such as CoreComm seeking to obtain the business of these companies in Ohio or other states do not have the advantage of an established relationship – developed as the fruit of a monopoly franchise – with the customers' headquarters. GTE seeks through merger to obtain the advantage, and thereby to use Bell Atlantic's monopoly position in its region to obtain a competitive advantage.

The classic Supreme Court decision on monopoly leveraging explained how a monopoly in one area may be used to leverage the monopolist's entry into another area in which he faces competitors:

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[50] Application, Kissell Affidavit, at ¶ 7.

> A man with a monopoly of theaters in any one town commands the entrance for all films in that area. If he uses that strategic position to acquire exclusive privileges in a town where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.[51]

By acquiring through merger the headquarters accounts of 175 of the Fortune 500 – all of them originally acquired as part of Bell Atlantic's monopoly control of New York City and other large East Coast MSAs – GTE will have acquired a "trade weapon" that no CLEC has and that it proposes to use to enter local markets. That is the essence of monopoly leveraging, and is another reason why this merger is anticompetitive.

B. The Merger Will Not Bring Significant New Competition to the Long-Distance Market

GTE and Bell Atlantic argue that the merger will increase competition in the country's long-distance market by giving the merged company a better opportunity to construct a national long-distance network. GTE is apparently arguing that it needs the additional financial resources and additional customers supplied by Bell Atlantic before undertaking to construct its own national long-distance network. This argument has at least three serious flaws.

First, this Commission has already rejected GTE's argument that effective long-distance competition is confined to the "Big Three." As the Commission recently noted in considering another merger application, "the supply of transmission capacity is expanding significantly with the

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51 *United States v. Griffith*, 334 U.S. 100, 107 (1948).

construction of four new national fiber-optic networks by Qwest, IXC, Williams and Level 3."[52] The Commission concluded that the new capacity of these four additional networks "will likely enable these firms, those that buy fiber capacity, and resellers to constrain any exercise of market power by any market participant or group of market participants."[53] With these four networks, plus the three already in place, it is unclear why an eighth network built by Bell Atlantic-GTE is necessary to bring competition to the long-distance market. As the FCC concluded, "the coverage of the new networks is sufficient to provide competitive national long distance service."[54]

Second, it is unclear why, if GTE believes the market will support an eighth national network, it does not proceed to build it. GTE is a vastly larger company than Qwest, IXC, Williams or Level 3 – companies that, as described by the FCC, are already building national fiber-optic networks. These companies did not have the advantage of two million long-distance customers in the fold and an entrenched local customer base (as GTE already does) to rely upon in recovering costs when they began construction of their networks. Nor did these companies have the ready-made supply of Fortune 500 customers that GTE is seeking to have handed to it through a merger, rather than competing for them. In short, the merger is simply unnecessary for GTE to build its own national long-distance network, if it believes the market justifies it.

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[52] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211 (September 14, 1998), at ¶ 43 ("*MCIWorldCom Merger Order*").

[53] *Id.*

[54] *Id.* at ¶ 54.

Finally, Bell Atlantic has not yet obtained authority under section 271 of the Act to provide long-distance service in any of the states in its region. Thus, Bell Atlantic's large corporate customers, which GTE is apparently seeking to obtain as a base for construction of another long-distance network, are not yet available to GTE – unless it remains separate from Bell Atlantic and competes independently for their business. For all these reasons, there is no merit to the argument that approval of the proposed merger is necessary to enhance long-distance competition for the benefit of consumers.

IV. IN LIGHT OF THE COMPETITIVE CONCERNS RAISED BY THIS PROPOSED TRANSACTION, THE COMMISSION SHOULD ORDER APPLICANTS TO PRODUCE THEIR HART-SCOTT-RODINO DOCUMENTS FOR REVIEW AND ORDER AN EVIDENTIARY HEARING.

The prospect of two large ILECs (one of which is itself the product of the recent merger of two dominant ILECs) combining their substantial access lines and monopoly market shares is a serious matter that merits more attention than consideration through pleadings back and forth between interested parties. As in the Bell Atlantic-NYNEX merger context, the Commission should review – and allow interested parties to review – the Hart-Scott-Rodino documents that Bell Atlantic and GTE have filed with the Department of Justice.[55] Such inspection could give the Commission and interested parties insight into the genesis of this proposed transaction and foster a more informed discussion of the competitive implications of the Bell Atlantic-GTE application.

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[55] *See Bell Atlantic/NYNEX Merger Order*, 12 FCC Rcd at 20000, ¶ 28 (referencing Nov. 22, 1996 letter from the Common Carrier Bureau requiring Bell Atlantic and NYNEX to make approximately 30,000 of the Hart-Scott-Rodino documents available for review pursuant to protective order).

In addition, the Commission should order an evidentiary hearing, which would be particularly helpful in developing a sound factual record and more closely analyzing the roadblocks to competition that Bell Atlantic and GTE have already imposed in their respective territories. Given the severe competitive concerns at issue in the proposed merger and the substantial questions of material fact they present, Bell Atlantic and GTE should be required to provide a detailed explanation of their public interest arguments, with appropriate opportunity for presentation and examination of the witnesses the companies have offered in support of the merger. In the end, only such a thorough process of hearings and internal company document review (pursuant, of course, to protective order) will allow the Commission to evaluate accurately whether Bell Atlantic and GTE have carried the burden of demonstrating that this proposed mega-merger would be in the public interest and promote competition.

V. IF THE MERGER IS APPROVED, CONDITIONS SHOULD BE PLACED ON THE MERGER TO REDUCE ITS ANTI-COMPETITIVE POTENTIAL, AND SWIFT SANCTIONS SHOULD BE IMPOSED FOR FAILURE TO SATISFY THE CONDITIONS.

CoreComm believes that the Commission should deny the Bell Atlantic-GTE merger following an evidentiary hearing and a thorough examination of the companies' Hart-Scott-Rodino documentation. For the reasons set forth above, approval would only lessen competition, and as a result, limit consumer choice and the quality of service. If, however, the Commission finds that the merger should be approved, this transaction cannot be found to serve the public interest without imposing strong, market-opening conditions on the new super ILEC. The *Bell Atlantic/NYNEX Merger Order* conditions, however, should not be considered sufficient. Indeed, the *Bell Atlantic/NYNEX Merger* conditions have been largely unsuccessful in ensuring that *the current Bell*

Atlantic entity complies with the procompetitive provisions of the Act. As MCI explained earlier this year in a Complaint filed with this Commission, "Bell Atlantic previously failed to comply with the Merger Order, and continues to do so, through its failure to price unbundled network elements based on forward-looking economic costs. . . . Bell Atlantic has now compounded its complete disregard for the critical market-opening provisions in the Commission's Merger Order by refusing to negotiate in good faith to develop adequate performance standards, remedies, and associated reporting."[56] If this merger is to be approved, improved conditions are needed to ensure that the new super-ILEC will truly open its markets to competitive entry, and swift sanctions are essential to address any failure to comply with these market-opening conditions. CoreComm sets forth below the kinds of conditions that should be used to enhance the floor established by the *Bell Atlantic/NYNEX Merger Order* conditions.

A. Pre-Merger Conditions

Emphasis needs to be placed upon pre-conditions to the merger. It is only by insisting that conditions be met *before* a merger is approved that the Commission will have any assurance that the conditions will be met. Since it is not feasible to undo a merger, the only threat to the new mega-ILEC following approval would be claims brought by aggrieved competitors. Yet parties trying to devote their resources to market entry and the delivery of quality service alternatives should not be forced to litigate merger conditions after approval has been granted. Given the relative inefficacy of after-the-fact remedies, CoreComm urges the Commission to impose the following pre-conditions upon the would-be mega-ILEC prior to the merger becoming effective.

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[56] Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

First, both Bell Atlantic and GTE should be required to divest themselves of any aspects of their operations that relate to the provision of interLATA services to customers in those service areas in which either company is the ILEC. GTE has sold long distance service in all 50 states since the end of 1996,[57] and Bell Atlantic offers long distance service in all but five states outside of its home region.[58] If the merger is approved without a divestiture pre-condition, GTE might be entitled to carry long distance traffic from Boston to New York, or from Washington, D.C. to California without running afoul of the section 271 prohibitions.[59] Yet, from a competitive perspective, there is no difference whether it is Bell Atlantic or GTE providing this in-region, interLATA service following the merger; the same ILEC entity will be providing long distance service, with all of the discrimination and access charge subsidy concerns that first gave rise to the MFJ present regardless of which entity provides the service.

GTE will undoubtedly note that it is not barred from offering interLATA services in its incumbent service areas at this time. Such cries are inapposite. Just as section 271 recognizes in barring Bell provision of in-region interLATA service, a prohibition on the provision of long distance service by the ILEC will be necessary in GTE's service areas as well to ensure that the new super-ILEC cannot engage in anticompetitive behavior. If this merger is consummated, the former GTE side of the super-ILEC will have just as much incentive to discriminate against competitors as

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[57] GTE Annual Rept. 1996, http://www.gte.com/AboutGTE/annual1996/intro/intro.html

[58] *See* http://www.callbell.com.

[59] The same reasoning holds true if it were Bell Atlantic providing long distance service to a customer in Fort Wayne, Indiana or York, Pennsylvania (both of which GTE serves as the ILEC).

the former Bell Atlantic side of the company, and with the significant size of the merged entity, more ability to discriminate than either the present GTE or the present Bell Atlantic does. Accordingly, the Commission should condition approval upon a complete ban on the provision of interLATA services by the new Bell Atlantic-GTE throughout the current Bell Atlantic and GTE service territories, until the super-ILEC demonstrates that the competitive nature of its operations in a particular state warrant section 271 relief.

In connection with this effort to ensure that effective competition takes root in Bell Atlantic and GTE territories before the merger, the Commission should also require the companies to provide discounts on resold services and prices for unbundled network elements that truly comply with the methodology set forth in this Commission's *Local Competition Order*.[60] Although such conditions were already part of the *Bell Atlantic/NYNEX Merger Order* approval,[61] making such pricing a precondition for merger approval would almost certainly prompt Bell Atlantic and GTE to come forward more quickly with more accurate avoided cost analysis and truly forward-looking, cost-based pricing proposals. The imposition of such a condition would prevent GTE from relitigating in state after state its stranded cost and interim universal service surcharge theories, saving CLECs the need to expend time and resources overcoming these barriers to entry. In short, the Commission should require as a precondition of merger approval that Bell Atlantic and GTE charge forward-looking prices – and *only* forward-looking prices – to new entrants seeking to compete with GTE.

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60 *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order,* 11 FCC Rcd 15499, 15850-15854, 15954-15964 (¶¶ 690-98, 907-34) (1996).

61 *Bell Atlantic-NYNEX Merger Order*, at Appendix C.6.

In the interim, as Bell Atlantic and GTE are developing these permanent rates in proceedings before the various state commissions, GTE should be required to make its previously arbitrated rates in any given state available to any CLEC wishing to use them in its own interconnection agreement. in that state.

Similarly, the Commission should demand that the Applicants demonstrate prior to merger consummation that they are providing technically feasible combinations of network elements at forward-looking cost-based rates. The ILECs' intransigence in providing network element combinations has no basis in technology or in economics, and is merely a roadblock they have created out of legal fiction to limit competitive entry. Imposing pre-conditions such as these is essential if competitors in Bell Atlantic's and GTE's territory are going to be able to withstand the combined market power of the new incumbent giant.

Bell Atlantic and GTE should also be required to have an OSS/EDI system operating perfectly throughout their territories with third party verification of that fact. If Bell Atlantic's OSS/EDI is to be used, it should be up and operating prior to the approval of the merger. Moreover, GTE and Bell Atlantic should be required, before the merger, to develop a best practices plan applicable to service improvement and to performing its responsibilities under its interconnection and resale agreements with time lines to be filed with the Commission for its review.

B. Post-Merger Conditions

In addition, if the merger is to be approved, further measures are needed *following the merger* to ensure that competition takes root in the new super-ILEC's service territories. Specifically, CoreComm recommends that the Commission use the *Bell Atlantic/NYNEX Merger* conditions together with the following conditions to protect against anticompetitive conduct by Bell Atlantic-GTE.

First, the Commission should ensure that the mega-ILEC cannot foist number portability costs upon its competitors unfairly. This is particularly a concern in GTE's service territory, where interim number portability ("INP") may continue to be used for some time in certain parts. Although this Commission has previously directed that INP costs should be recovered from competitors in a competitively neutral manner,[62] GTE has proposed in state after state that it should be permitted to recover the full incremental cost of providing INP from its competitors.[63] Rather than making competitors fight GTE on this issue in every jurisdiction, this Commission should compel the new Bell Atlantic-GTE, as a condition of merger approval, to establish a competitively neutral INP cost recovery mechanism that is consistent with those set forth in the *Number Portability Order*.

The Commission should also require the new Bell Atlantic-GTE to refrain from charging special construction charges to CLECs. The need for special construction charges arises because the ILECs have previously constructed their networks in an inefficient manner that does not take into account more modern ways of delivering services to consumers and the arrival of competitors into the market. Since a forward-looking, Total Element Long-Run Incremental Cost ("TELRIC") study would presume that all aspects of an ILEC's network (except for the location of the wire centers) should be variable, special construction to accommodate competitors would not be needed in the

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[62] *Telephone Number Portability*, CC Docket No. 95-116, First Report and Order (rel. July 2, 1996), at ¶ 138 ("*Number Portability Order*").

[63] *See, e.g.*, Docket 7702 (Hawaii P.U.C.); Cause No. 40618 (Indiana U.R.C.); Docket No. P-100, Sub133d (North Carolina U.C.).

development of this network. Accordingly, if the Commission is going to implement a TELRIC-based pricing mechanism for Bell Atlantic-GTE as a pre-condition of merger approval, it should also direct the mega-ILEC to refrain from imposing any special construction charges after the merger.

Following the merger, Bell Atlantic-GTE should also be required to impose only reasonable, cost-based non-recurring charges ("NRCs") for services provided to competitors. In the resale context, these NRCs should be developed on the basis of an avoided cost analysis that applies a wholesale discount to the retail NRC. In the context of UNEs and where a retail analog does not exist for a resale NRC (*e.g.*, a service migration charge), the NRCs should be developed using forward-looking cost principles.

If the merger is to be approved, Bell Atlantic-GTE should be required to make its voicemail services available for resale at an avoided cost discount. Technical limitations and economic barriers prevent resellers such as CoreComm from offering voicemail in the same manner and at the same level of quality that the ILEC offers to its own customers. The inability to provide VMS places resellers at a competitive disadvantage, as they cannot offer an entire segment of the ILEC's customer base the VMS they have come to expect from the incumbent. Requiring Bell Atlantic-GTE to provide VMS for resale would eliminate the tying arrangement between the ILEC's local exchange service and its VMS, and provide resellers with the opportunity to compete for each and every customer in the ILEC's embedded customer base.

The Commission should also compel the combined Bell Atlantic-GTE to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the Bell Atlantic-

NYNEX merger.[64] Since Bell Atlantic is already compiling data on a monthly basis under the existing merger conditions, it should not be too much of an additional burden to publish those results on a monthly basis as well. By contrast, a span of even three months can make a substantial difference in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent – especially one like the proposed Bell Atlantic-GTE company, which would have a monopolistic level of market share and bottleneck control of essential facilities across such a large span of the nation.

Finally, the Commission should require the mega-ILEC to provide services to competitors at a minimal level of performance. For each reporting category imposed in the *Bell Atlantic/NYNEX Merger Order* (and enhanced through monthly reports above), Bell Atlantic-GTE should be required to meet a certain threshold of performance so that carriers can determine with certainty when Bell Atlantic-GTE is discriminating in the provision of service. Specifically, the Commission should instruct Bell Atlantic-GTE to identify a level of performance (for each reporting category) that corresponds to its own self-provisioning of service; after every three reporting periods, the Commission could revisit this issue and adjust the standards as necessary, depending upon the mega-ILEC's performance in self-provisioning services during that time.

C. Sanctions for Breach of Merger Conditions or Substandard Performance

Enhanced conditions and stricter reporting requirements may prove largely ineffective by themselves in stopping a combined Bell Atlantic-GTE from discriminating against competitors. As CoreComm noted above in emphasizing the importance of pre-merger conditions, CLECs should

[64] *Bell Atlantic/NYNEX Merger Order*, at Appendix C.1.d.

not be forced to litigate (and indeed, do not have the resources to litigate) every instance in which the new mega-ILEC engages in discriminatory conduct or violates the merger conditions. Accordingly, CoreComm recommends that the Commission establish a system of financial sanctions to be imposed whenever Bell Atlantic-GTE fail to satisfy the performance standards advocated above. For example, if Bell Atlantic-GTE's performance vis-a-vis new entrant in any category covered by the performance standards falls below the level of performance it provides for its own operations for a specified period of time, the Commission should assess a fine in a meaningful amount for the period thereafter that the substandard performance in that category continues. Purely by way of example, in certain Bell Atlantic interconnection agreements, the incumbent has agreed to pay liquidated damages of up to $75,000 in cases where Bell Atlantic's performance falls below a certain measurement threshold for three consecutive months.[65] CoreComm advocates that the amount should be meaningful, so that it does not simply become another cost of doing business. Adopting appropriate performance penalties would help ensure that there are adequate disincentives to deter the larger, richer, more powerful combined Bell Atlantic-GTE from engaging in anticompetitive conduct.

Moreover, for those merger conditions that are unrelated to performance (*e.g.*, the imposition of special construction charges), the Commission should create a separate system of penalties to

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[65] *See Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 Dated as of June 25, 1996 by and between New York Telephone Company and MFS Intelenet of New York, Inc.*, at §27.3 (providing for liquidated damages of $75,000 for each specified performance breach by New York Telephone). CoreComm does not intend to suggest that this $75,000 amount or the three month period negotiated by Bell Atlantic is appropriate. Rather, it is CoreComm's view that the concept of a payment to the injured party to compensate it for the injury caused it by ILEC performance failures would be appropriate here.

address violations. For example, in instances in which the mega-ILEC fails to provide reports on a monthly basis or refuses to resell VMS to competitors, the Commission should impose a significant penalty for each day of a continuing violation. As in the case of performance breaches, this amount also has a sound basis; 47 U.S.C. § 502 allows the Commission to impose such a fine for each and every day that a person willingly and knowingly violates any Commission rule, regulation, restriction, or condition.

VI. CONCLUSION

In light of the competitive concerns raised by this transaction, CoreComm submits that the Commission should, after evidentiary hearing and a review of the applicable Hart-Scott-Rodino documentation, reject this merger as being contrary to the public interest. In the alternative, if the Commission finds that this transaction should be approved, CoreComm respectfully requests that approval should be conditional upon Bell Atlantic-GTE satisfying a series of market opening conditions *prior* to the merger and agreeing to adhere otherwise to the *Bell Atlantic/NYNEX Merger Order* conditions and other post-merger conditions aimed at minimizing the ability to discriminate against competitors. Most importantly, to ensure that these conditions serve their intended purpose, the Commission should establish a system of strict yet reasonable sanctions for failures to provide service to competitors at parity and for other violations of the merger conditions.

Respectfully submitted,

Eric J. Branfman
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-7553 (Tel)
(202) 424-7645 (Fax)

Christopher A. Holt
Assistant General Counsel
CoreComm Incorporated
110 East 59th Street
New York, NY 10022
(212) 906-8440 (Tel)
(212) 906-8497 (Fax)

ATTORNEYS FOR
CORECOMM LTD.

Dated: November 23, 1998

CERTIFICATE OF SERVICE

I, Joyce A. Gustavson, hereby certify that on this 23rd day of November 1998, copies of the foregoing **Comments of Corecomm Ltd.** were served on the following parties via first-class U.S. mail, postage pre-paid:

Magalie Roman Salas* (orig. and 12)
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

International Transcription Service, Inc.*
Attn: Duplicating Contractor
1231 20th Street, N.W.
Washington, D.C. 20036

Jeanine Poltronieri*
Wireless Telecommunications bureau
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

Radhika Karmarke*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Janice Myles*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Chief* (2 copies)
International Bureau
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Michael Kende*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

To-Quyen Truong
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Lisa Choi*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Bill Dever*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

Cecilia Stephens (w/diskette)*
Policy Programming Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 544
Washington, D.C. 20554

William P. Barr
Executive Vice President - Government and
Regulatory Advocacy and General Counsel
GTE Corporation
One Stamford Forum
Stamford, CT 06904

James R. Young
Executive Vice President - General Counsel
Bell Atlantic Corporation
1095 Avenue of the Americas
New York, NY 10036

Joyce A. Gustavson

*Served via hand delivery